No. 1503

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

UNITED STATES OF AMERICA
Plaintiff in Error,

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

The case here is upon writ of error to the United States District Court of the Territory of Hawaii. The defendant in error is a native of Germany who emigrated to the Hawaiian Islands in April, 1891, and has resided there ever since.

On March 28th, 1907, he made and filed with the United States District Court of the Territory of Hawaii, petition for his naturalization as a citizen of the United

States under the Naturalization Act of June 29th, 1906 (pp. 2, 3, 4, 5, and 6 of Record).

As appears by the last clause of the petition (p. 4 Record) and the stipulation relative to Bill of Exceptions (p. 25 Record), the petitioner had never previously made a declaration of intention under oath.

The Government of the United States appeared in the case by Robert W. Breckons, United States Attorney for the said District and Territory of Hawaii by virtue of the provisions of Section 11 of the said Naturalization Act of June 29, 1906 (U. S. Stat. L., Vol. 34, p. 596).

At the hearing of said petition on August 13, 1907, after the testimony of the applicant, defendant in error here, and his witnesses had been heard, the Court ordered the petitioner to be sworn in as a citizen of the United States, to which order, said counsel for the United States, on behalf of the United States, objected upon the grounds that the Court had no jurisdiction to make, give, or render any judgment of naturalization in the said cause, for the reason that it affirmatively appeared that the petitioner had not made the declaration of intention called for by the Naturalization Act of June 29th, 1906, and upon the further ground that said Act of June 29th, 1906, repealed and superseded Section 100 of the Act to Establish a Government in the Territory of the Hawaiian Islands (31 Stat. L., Ch. 339, p. 141), commonly known as the Organic Act, upon the ground that upon the showing made by the petitioner, his petition should be denied and dismissed, which ob-

jection the Court overruled, and to which ruling and to all the proceedings in said matter counsel for United States on behalf of the United States, duly excepted. Thereupon, the applicant and petitioner, Georg Friedrich Rodiek, defendant in error here, was sworn in as a citizen of the United States (pp. 15, 16, and 17, Record).

SPECIFICATION OF ERRORS.

The errors relied upon by the Government herein, are as follows (pp. 21, 22, and 23, Record):

I.

Said Court had no jurisdiction to make, give or render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek, said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

II.

Section 100 of the Act of Congress to establish a Government for the Territory of Hawaii, approved April

30, 1900, has been and is now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

III.

Said Court erred in holding and deciding that it had jurisdiction to make, give and render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek, said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

IV.

Said Court erred in holding and deciding that Section 100 of the Act of Congress to establish a government for the Territory of Hawaii, approved April 30, 1900, has not been and is not now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

V.

Said Court erred in granting the application of petitioner and applicant herein.

VI.

Said Court erred in not denying the application of petitioner and applicant herein.

VII.

Said Court erred in overruling the objection of the United States of America to the granting of the application of petitioner and applicant herein.

VIII.

Said Court erred in making, giving, rendering, entering and filing its judgment in the above-entitled matter in favor of the above-entitled petitioner and applicant, and against the objections of the United States of America.

IX.

Said Court erred in making, giving, rendering, entering and filing its final judgment in the above-entitled matter in favor of said applicant and petitioner, and against the objections of the United States of America, upon the pleadings and record in said matter, in this, that said final judgment was and is contrary to law, and to the case made and facts stated in the pleadings and record in said action.

BRIEF OF THE ARGUMENT.

The argument will be divided under three general heads, to-wit:

1. That the acquiring of citizenship of the United

States by aliens is a statutory privilege, and statutes granting the same must be strictly construed in favor of the Government, and against the applicant.

2. That the special provision relating to declaration of intention contained in Section 100 of the said organic act of the Territory of Hawaii, was repealed by implication by the Naturalization Act of June 29, 1906.

3. That said special provision is in any event, unconstitutional.

I.

Under the first general head of the argument, the following proposition is presented:

The privilege of citizenship of the United States by naturalization is strictly statutory (*Zartanan vs. Billings,* 204 U. S. C. 70). It is not an inherent right, and aliens who desire to avail themselves of the privilege must comply strictly with the law. When an alien is naturalized, he acquires rights common to all other citizens of the United States. Among other things, he acquires the right to the elective franchise, and to secure a homestead out of the public domain.

Before he can be entitled to naturalization he must comply with all the requirements of the statute as to preliminary matters as well as to the final act of naturalization, and where there is any doubt as to what is required by the law, the doubt should be resolved against the applicant and in favor of the Government.

The doctrine is firmly established that only that which

is granted in clear and explicit terms passes by a grant of property, franchises, or privileges.

Coosan Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.

Statutory grants are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.

Holyoke W. P. Co. vs. Lyman, 82 U. S., 15 Wall. 200;

Central Trans. Co. vs. Pullman etc. Co., 139 U. S., 24; 35 L. Ed. 55.

II.

Under the second general head of the argument:

First—The general nature of the Naturalization Act of June 29, 1906.

This Act provides that an alien may be admitted to become a citizen of the United States in the manner authorized by itself, "*and not otherwise*" (Sec. 4). It is intended to provide "a *uniform* rule for the naturalization of aliens"; and Congress intended this "uniform rule" to apply "*throughout* the United States." In adopting the Act, Congress had in mind the Territories, and in particular the Territory of Hawaii, as may be seen from Section 3, and, indeed, other sections of the Act. And in Section 26, Congress provided that "All Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed." It is submitted that a careful reading of the Act, and of all of

its provisions, will make it clear that the purpose of Congress in adopting the Act was to reconstruct and remodel the existing law of naturalization, to prescribe the only rule by which aliens might be admitted to citizenship, to make that rule uniform, and to insist upon its observance "throughout the United States." If this view of the statute be correct, it is entirely obvious that Section 100 of the Organic Act of the Territory of Hawaii, being inconsistent with and repugnant to the Naturalization Act of June 29, 1906, is no longer in force; and Mr. Rodiek can become a citizen of the United States only by compliance with the terms and provisions of the latter Act, "and not otherwise."

That the said special provision contained in said Section 100 of the Organic Act of the Territory of Hawaii relating to declarations of intention, is repugnant to, and inconsistent with, the provisions of said Act of June 29, 1906, is plain when we come to examine certain particular provisions of the said Act of June 29, 1906, to-wit:

(a) The proviso in the first paragraph of the first subdivision of Section 4 of said Act of June 29, 1906, is as follows:

> "Provided, however, that no alien who, in conformity with the law in force at the date of his declaration of intention to become a citizen of the United States, shall be required to renew such declaration."

(b) The proviso in the first paragraph of the second

subdivision of Section 4 of the Act of June 29, 1906, is as follows:

> "Provided that if he has filed his declaration before the passage of this Act, he shall not be required to sign the petition in his own handwriting."

(c) The last paragraph of said subdivision second of said section 4 provides in part, as follows:

> "At the time of filing his petition, there shall be filed with the Clerk of the Court, . . . the declaration of intention of such petitioner, which . . . declaration shall be attached to, and made a part of said petition."

The foregoing provisions clearly indicate that Congress intended that every alien who desired to become a citizen must first make a declaration of intention under oath as required by the said Act, except, perhaps, in the cases of honorably discharged soldiers, and men enlisted in the United States Navy or Marine Corps, to which particular matters we shall hereafter refer more in detail.

Second—The principle of statutory construction to which we appeal is so well formulated in a well considered New Jersey case, that we do no more than quote the principle as there formulated:

> "Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed

"as repealing the earlier act. The rule does not "rest strictly upon the ground of repeal by impli- "cation, but upon the principle that when the legis- "lature makes a revision of a particular statute, "and frames a new statute upon the subject mat- "ter, and from the frame-work of the Act it is "apparent that the legislature designed a complete "scheme for this matter, it is a legislative declara- "tion that whatever is embraced in the new law "shall prevail, and whatever is excluded is dis- "carded. It is decisive evidence of an intention to "prescribe the provisions contained in the later act "as the only ones on that subject which shall be "obligatory."

Roche vs. Mayor, etc., of Jersey City, 40 N. J. L. Rep. 257.

The principle so clearly stated here by the New Jersey Court will be found amply supported and applied by the Federal cases:

U. S. vs. Tynen, 78 U. S. (11 Wall.) 92;

The Pakuete Habana, 175 U. S. 677-679-686;

1 Fed. Stat. Annotated, p. 116, note 8.

The judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction.

Oats vs. First Nat. Bank, 100 U. S. 239; 25 L. Ed. 582-3.

It is the duty of the Courts to "promote in the fullest manner the apparent policy and object of the legislation."

U. S. vs. Jackson, 143 Fed. 783.

The titles of the Acts are the best brief summary of

their purposes and those purposes are obviously of public benefit.

Millard vs. Roberts, 202 U. S. 429;

Church of the Holy Trinity vs. U. S., 143 U. S. 457; 36 L. Ed. 226;

Coosaw Mng. Co. vs. South Carolina, 144 U. S. 550; 36 L., Ed. 537.

Third—Mischief to be Remedied.—In construing the statute and in endeavoring to ascertain the intent of Congress in passing the same where there is any doubt as to the meaning or the intention, it is always proper to consider the mischief intended to be remedied by the passage of the Act.

A guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Church of the Holy Trinity vs. U. S., 143 U. S. 457; 36 L. Ed. 226.

In the case *in re Mathews,* 109 Fed. Rep. 617, the Court used the following language:

> "Blackstone, in his Commentaries, mentions three
> " things which are to be considered in the construc-
> " tion of all remedial statutes: the old law, the
> " mischief, and the remedy; that is, how the law
> " stood at the making of the Act, the mischief for
> " which that law did not adequately provide, and
> " what remedy the legislature has supplied to cure
> " this mischief. It is the duty of the judges so to

"construe the Act as to suppress the mischief and "advance the remedy. This injunction is simply "to carry out the intention of the lawmaker, which "is the cardinal aim with reference to all statutes."

Therefore, it is proper here to inquire what was the particular mischief intended to be remedied by the passing of the Act of June 29, 1906.

Prior to the passage of said Act, the naturalization laws of the United States were contained generally in Title XXX of the Revised Statutes under the general head "Naturalization." Said Title contained Sections 2165 to 2174 inclusive, all relating to naturalization. Section 2167 was the so-called "Minor Act," and provided in substance that any alien of any race which might be naturalized as citizens of the United States, having come to the United States under the age of eighteen years, and having thence resided here continuously until he made application, and for at least five years in all, and after having reached the age of majority, might be naturalized upon his petition, without having first made a declaration of intention under oath, as required of other aliens. The said section was the source of the great majority of naturalization frauds that have been committed in the United States.

In the report of the Commission of Naturalization appointed by executive order March 1, 1905, and which said report was submitted November 8, 1905, and submitted to Congress and printed and referred to the Committee on Immigration and Naturalization and designated "Document No. 46 of the House of Repre-

sentatives, 59th Congress, first session," we find the following language on page 12 thereof:

> "In securing naturalizations for political purposes and for other improper purposes, the applicants commonly avail themselves of what is known as the minor's act (Sec. 2167 R. S., Act of May 26, 1824), and it is the opinion of Mr. Van Deusen, the special examiner of the Department of Justice, which the Commission believes to be correct, that more perjury is committed under this law than under any other naturalization law. It provides that an alien who comes to the United States under the age of eighteen years may, after 5 years' residence, be admitted to citizenship without having made the preliminary declaration of intention required from aliens coming to this country after the age of 18. It frequently happens, therefore, that one who desires to secure naturalization, seeing that he can do so at once if he swears that he came to this country under 18 years of age, whereas he would otherwise be obliged to make the declaration of intention and wait for two years, commits perjury and secures his naturalization papers the same day on which he applies for them."

On page 78 of the said printed report, Appendix D., in the tabulated portion of the report of Joel M. Marx, special assistant United States Attorney appointed theretofore to prosecute naturalization frauds in New York, we find that out of 791 cases wherein complaints were filed, the defendants arrested for naturalization frauds, 475, or considerably more than one-half, were for violations committed under said Section 2167 of the Revised Statutes.

On page 80 of the said report, Appendix E., we find the following extract from the report of C. V. C. Van Deusen, special examiner of the Department of Justice, relative to said Section 2167, Revised Statutes, to-wit:

> "The provisions of Section 2167 of the Revised
> " Statutes, known as the 'Minor's clause,' whereby
> " aliens arriving in the United States under the
> " age of 18 years are permitted admission as citi-
> " zens without a previous declaration of intention,
> " should be repealed, and all aliens of the age of 19
> " years and over should be required to make such
> " declaration at least two years prior to admission.
> " A majority of the naturalization frauds per-
> " petrated are committed under the provisions of
> " this section of the law."

The said Commission (p. 12 of said report) recommends that both the "Minor's law" and the law requiring the preliminary declaration of intention be repealed.

Congress, however, rejected the recommendation as to repeal of the law requiring preliminary declaration of intention, but adopted the recommendation as to the repeal of the so-called "Minor's law."

It will thus be seen that the principal mischief to be remedied, and intended to be remedied by the passage of the Act of June 29, 1906, was the prevention of frauds under said Section 2167 of the Revised Statutes wherein no declarations of intention were required.

Section 26 of the Act of June 29, 1906, expressly repeals Sections 2165, 2167, 2168, and 2173 of the Revised Statutes of the United States, all of which sections were contained in said Title XXX of the Revised Statutes

under the general head of "Naturalization," as above stated.

It must be presumed, therefore, that Congress intended that the remaining sections of said Title XXX, if not inconsistent with, or repugnant to, the provisions of the Act of June 29, 1906, should remain in force.

The provisions of Section 2166 of said Title XXX of the Revised Statutes, wherein honorably discharged soldiers of the United States may be admitted to citizenship without first having made a declaration of intention, is not upon the same footing with the provisions of Section 2167, Revised Statutes, nor with the said provisions relating to declaration of intention in said Section 100 of the Organic Act of Hawaii, for the reason that it is always possible for an honorably discharged soldier to prove such honorable discharge by documentary evidence of the same, and he is not required to reside more than one year in the United States.

The provisions relating to the naturalization of enlisted men in the United States Navy or Marine Corps, contained in the Naval Appropriation Act of July 26, 1894 (28 Stat. at Large, 124), operate generally throughout all of the United States, and in the latter provision, as in Section 2166, it is possible to always present documentary proof of the applicant's service in, and honorable discharge from, the United States Navy or Marine Corps.

The above-mentioned provisions are operative

throughout all the United States, and neither is local or special, geographically.

It appears to us that it is quite plain that Congress intended that all the acts or parts of acts which dispensed with the previous declaration of intention, with the exceptions of the provisions above referred to, relating to honorably discharged soldiers and enlisted men in the Navy and Marine Corps, which, however, are not local or special, geographically, as above pointed out, should be repealed, and that, therefore, the said special provision of said Section 100 of the Organic Act of the Territory of Hawaii, wherein the same dispenses with the previous declaration of intention by aliens who have resided in the Hawaiian Islands for at least five years prior to April, 1900, are repealed by the enactment of the said Naturalization Act of June 29, 1906. That provision is local and special to the Territory of Hawaii only. All aliens coming within its ~~province~~ provision, if it is operative, can be naturalized without making a previous declaraton of intention. It would also leave the door open to the frauds that were committed under said repealed Section 2167, Revised Statutes, and that was the mischief, as hereinbefore pointed out, intended to be remedied by the Act of June 29, 1906.

Fourth—Departmental Construction.—The contemporaneous construction of a statute by those charged with its execution, . . . is entitled to great weight, and should not be disregarded or overturned except for

cogent reasons, and unless it be clear that such construction is erroneous.

U. S. vs. Johnston, 124 U. S. 236; 31 L. Ed. 394.

It is true, of course, that the Act of June 29, 1906, has not been in existence long, and that therefore the departmental construction thereof has not "long prevailed," but that does not necessarily render the rule above cited negatory. Those who have, for any time whatever, and in this case it has now been more than one year, had the duty of executing the statute, must necessarily have given it a close study, and their construction should be given great weight.

In determining what construction the Department of Commerce and Labor has given the Act of June 29, 1906, with reference to the special provision in question in said Section 100 of the Organic Act of the Territory of Hawaii, we have to look at the Naturalization Regulations adopted and promulgated by the Department of Commerce and Labor under authority and by virtue of Section 28 of the Act of June 29, 1906. Nowhere in said regulations do we find any reference or instruction to subordinate officers or clerks of Courts having to do with naturalization matters relating to said special provision in said Section 100 of the Organic Act of the Territory of Hawaii.

We do find, however, that clerks have been instructed in the matter of receiving petitions for naturalization from honorably discharged soldiers under Section 2166,

Revised Statutes, and from members of the Navy or Marine Corps under the Act of July 26, 1894 (28 Stat. L. 124), wherein antecedent declarations of intention are not required. (See par. 24 of the Regulations of October 2, 1906, and September 23, 1907.)

The conclusion is irresistible that the department construes the Act of June 29, 1906, to continue in force the last above-mentioned provisions, but not the Hawaiian special provisions.

III.

The said special provision contained in said Section 100 *of the Organic Act of the Territory of Hawaii relating to declarations of intention, is, in any event, unconstitutional.*

The fourth subdivision of Section 8 of Article I of the Constitution of the United States, provides that the Congress shall have power "to establish an uniform rule of naturalization . . . throughout the United States."

Pursuant to the power vested in it by the foregoing constitutional provision, Congress has "established an uniform rule of naturalization throughout the United States" by the passage of the Act of June 29th, 1906.

That Congress intended said Act to be an "uniform rule of naturalization throughout the United States" is

evidenced not only by the title of the Act, but by all of its provisions taken together.

The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical.

Hanover Nat. Bank vs. Moyers, 186 U. S. 181; 46 L. Ed. 1119.

In the last cited case, the question of the constitutionality of the national bankruptcy law was raised. The provision in the Constitution relating to the power to pass naturalization laws, also gives Congress the power to pass uniform laws on the subject of bankruptcies throughout the United States.

See, also,

Leidigh Carriage Co. vs. Stengle, 95 Fed. Rep. 646.

If the Naturalization Act of June 29, 1906, is an "uniform rule of naturalization throughout the United States," then the special provision relating to declarations of intention contained in said Section 100 of the Organic Act of the Territory of Hawaii, being a special provision operative only in the Territory of Hawaii, cannot stand as against said constitutional provision for the reason that the rule of naturalization would not be uniform throughout the United States; that is, geographically speaking.

It is therefore respectfully submitted that the lower Court should be reversed.

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